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In The

Supreme Court of the United States

October Term, 1993

STERLING SUFFOLK RACECOURSE LIMITED PARTNERSHIP,

Petitioner,

v.

BURRILLVILLE RACING ASSOCIATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF *AMICI CURIAE* OF KENTUCKY THOROUGHBRED ASSOCIATION, INC., KENTUCKY THOROUGHBRED OWNERS AND BREEDERS, INC. AND THOROUGHBRED OWNERS AND BREEDERS ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a party "especially benefitted" by express statutory rights created under the Interstate Horseracing Act of 1978 has an implied right of action to enforce those rights where there is no indication of a contrary legislative intention but where that party was not included in the express statutory remedy.

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INTEREST OF THE AMICI CURIAE

The Kentucky Thoroughbred Association, Inc. ("KTA") and the Kentucky Thoroughbred Owners and Breeders, Inc. ("KTOB") are two interrelated not for profit organizations which serve as the trade associations representing owners and breeders of Thoroughbred horses in the Commonwealth of Kentucky. In that capacity, the organizations administer state-bred incentive programs, represent Thoroughbred interests at local and state government levels, initiate marketing programs for the breed and generally promote Thoroughbred breeding and racing. By statute, the KTOB has the duty to recommend the Thoroughbred breeders to serve on the Kentucky State Racing Commission. KRS § 230.400(2) Further, KTOB is the sole official registrar of Kentucky Thoroughbred stallions and Kentucky bred Thoroughbreds for purposes of the Kentucky Thoroughbred Development Fund. KRS § 230.400(6)(a). KTA, the sister organization to the KTOB, negotiates on behalf of Thoroughbred owners, breeders and trainers for contracts with the various Kentucky Thoroughbred racetracks. Under contracts with Kentucky's three leading Thoroughbred race tracks (Churchill Downs, Keeneland and Turfway Park), the KTA serves as the Horsemen's Group, an "especially benefitted" party under the Interstate Horseracing Act of 1978 ("IHA").

The Commonwealth of Kentucky is without question the center of the Thoroughbred breeding industry. Likewise, the Thoroughbred racing industry occupies a unique position as the "most prestigious and valued industry" within the Commonwealth of Kentucky. *Chernick v. Fasig-Tipton, Ky., Inc.*, 703 S.W.2d 885, 890

(Ky.Ct.App. 1986). By virtue of Kentucky's preeminent role in the industry, the KTA and the KTOB represent the long-term interests not only of Kentucky owners and breeders but the Thoroughbred industry nationwide. The KTA and the KTOB have a membership base of 1,300 owners, breeders and trainers of Thoroughbred horses in the Commonwealth of Kentucky. Through October of 1993, five of the top ten leading stallions for 1993, including the top two stallions, stood at Claiborne Farm in Paris, Kentucky, whose owners are members of KTA/KTOB, and one of which serves as vice-president and director of KTA/KTOB. Four of the other top ten stallions, for a total of nine out of ten, also stand in Kentucky. The horses, whose owners or stud managers are members of KTA/KTOB, included great racehorses like Secretariat, Affirmed, and Seattle Slew, as well as great stallions like Mr. Prospector, Danzig, Nijinsky II and others. As approximately one-third of Thoroughbreds foaled each year are bred in Kentucky, the membership represents a major voice in the Thoroughbred industry nationwide.

Thoroughbred Owners and Breeders Association, Inc. ("TOBA") is a Delaware, non-profit corporation with its principal office in Lexington, Kentucky. TOBA was formed in 1961 by the merger of two predecessor organizations to promote and protect Thoroughbred racing and breeding and the interests of Thoroughbred horse owners and breeders. Approximately three thousand owners and breeders of Thoroughbred horses throughout the United States are members of TOBA. In addition, thirty-four state associations of owners and breeders are members of TOBA, and the presidents of eight of these state associations (California, Florida, Illinois, Kentucky, New Jersey,

New York, Texas, and Washington) presently serve on TOBA's forty-three member Board of Trustees. These eight State Trustees alone represent approximately ten thousand Thoroughbred breeders and licensed race horse owners in their respective states. TOBA members and the members of its thirty-four state associations form a substantial percentage of the approximately fifty thousand licensed owners of Thoroughbred race horses in the United States. Furthermore, most of the leading money-winning and stakes-winning race horse owners in North America are members of TOBA. The individual interests of TOBA, as well as its members' collective economic interests, in the subject matter of this litigation are very significant.

The members of the three organizations filing this brief are actively involved in the thoroughbred racing industry. Whether breeders, owners, or horsemen, they depend on the economic success of horse racing and breeding for their livelihoods.

ARGUMENT

The IHA is the principal federal statute regulating the horse racing industry. The legislative history of the IHA indicates that Congress was acutely aware of the potentially destructive impact of interstate gambling on horse races. In order to temper that impact, Congress put in place a self-protection mechanism for those with pre-existing economic interests that might be impacted. Instead of establishing a new bureaucracy to administer interstate simulcasting, Congress chose to prohibit

wagering on interstate simulcasts entirely unless consent is obtained from each of five designated entities: the Host Racing Association, the Host Racing Commission, the Horsemen's Group, the Off-Track Racing Commission, and all "currently operating" horseracing tracks within a sixty-mile radius of any proposed off-track betting office. The IHA thereby ensures that the industry itself controls the spread of interstate off-track betting (IOTB). The First Circuit's decision in *Sterling Suffolk Racecourse, Ltd. v. Burrillville Racing Ass'n*, 989 F.2d 1266 (1st Cir. 1993), eliminates the sixty-mile track approval right and thereby destroys the only federal statutory control against the proliferation of interstate gambling on horse races. Because the vitality of the entire Thoroughbred horse industry is threatened by the First Circuit's decision, this Court should issue a writ of certiorari.

During the early 1980's, other factors, such as tax policy, skewed the relationship between races run and growth of the Thoroughbred foal crop. The more recent data, however, shows a direct correlation between the amount of live racing available and the size of the foal crop. D. Heckerman, *Manes, Tails, Fannies and Bucks*, Thoroughbred Times (Nov. 5, 1993). As a result, the economic health of the breeding industry directly depends on the number of tracks conducting live racing.

The legislative history of the IHA demonstrates IOTB to be an actual not imaginary threat to live racing. Congress considered the examples of New York and France and the impact of IOTB. In each of these two instances, unfettered simulcasting had a drastic effect on the vitality of regional tracks. France was able to maintain its regional tracks only through a series of subsidies. S. Rep.

No. 95-554, 95th Cong. 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 4132-44, at 4135-36. The threat of competition today from IOTB is much greater than it was in 1978, the date of passage for the IHA. The increase nationwide of casino and riverboat gambling along with state-sanctioned lotteries, coupled with the increase of IOTB, has magnified many fold the threat to live racing.

Currently there are some 103 tracks in 30 states that offer live horseracing.[1] Head to head competition with IOTB outlets is particularly threatening to regional, as opposed to national, tracks. These regional tracks do not offer, on a daily basis, racing at the same level as that offered by national tracks. As even a casual observer knows, there are only so many great horses. A horse of Secretariat's calibre runs once in a lifetime; in a given year there are only a few hundred horses competing for racing's largest and most prestigious prizes. Nevertheless, regional tracks offer a quality live product that accounts for some seventy-five percent of the industry. The horses that do not compete in the classics and the owners that cannot afford to compete at that level maintain the viability of the sport on a less grand scale. Interest in major races enhances interest in the local product, and people who attend local tracks are more likely to be interested in major races.

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[1] Significantly, forty-two states have racing commissions indicating a statutory basis for horse racing. At least two states, Minnesota and Alabama, that previously offered significant live racing now offer little or no live racing and have become primarily IOTB outlets. *See American Racing Manual* 452-57, 470-71 (1993).

Moreover, the sheer size of the local market makes it a vital component of the racing industry. These tracks provide a substantial portion of the market for breeders. The success of breeding as an industry depends directly on the number of opportunities for horses to compete. Regional tracks provide a significant number of those opportunities. IOTB outlets pose a particular threat to these venues because a nearby IOTB office can accept wagers on simulcast racing from the national tracks, and can run its operation without the costs that inhere in the daily presentation of live horse racing. The sixty-mile consent provision was intended to allow regional tracks some measure of protection for the environment in which they operate and to insulate the live product from destructive competition from IOTB outlets.[2] While gambling interests prosper as IOTB expands, the horse industry suffers. IOTB outlets make money without horses, by enabling patrons in one state to bet on races being run in another.[3]

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[2] The careful, express limitation of the right to those times when the live racetrack qualifies as "currently operating," *see* 15 U.S.C. § 3002(14), is not anti-competitive in effect.

[3] Thus, an IOTB outlet in Texas within driving distance of Louisiana Downs can accept wagers on races at the nation's premier tracks and offer the racing public the opportunity to wager on those races at the same time that Louisiana Downs offers live racing. Any person who patronizes the IOTB outlet represents lost support for the live racing industry. If the consent provision were enforceable, Louisiana Downs would be able to determine whether it should compete directly with the IOTB outlet – or whether it should withhold its approval in order to safeguard its market and its employees.

In the wake of the First Circuit's decision that the consent provision is unenforceable, no IOTB office will bother to obtain the required consent of sixty-mile tracks prior to accepting a wager on a race at another venue. That decision holds that those tracks have no coercive right against an office that refuses to obtain these consents. The *Sterling* holding directly threatens the economic interests of KTA/KTOB and TOBA. The vitality of racing at regional, as opposed to national, venues depends on the vitality of the IHA's consent provisions. Although Santa Anita or Belmont Park might be able to succeed with IOTB offices next door, it is much harder for a track that conducts racing on a less grand scale and before a more modest audience. These regional tracks provide much of the market for the industry's product, horses, and it is the success of that product on which our members depend. Owners and breeders enjoy derivative protection under the IHA – the sixty-mile consent provision safeguards regional racing and thereby protects the health of the industry. If the First Circuit's opinion shapes behavior in the market, even that derivative protection will disappear. The statute was passed "in order to further the horse racing *and* legal off-track betting industries in the United States." 15 U.S.C. § 3001 (emphasis added). This brief is an effort to highlight that conjunction; the First Circuit read the statute to the exclusive benefit of the betting industry.

In its opinion, the First Circuit interpreted the statute from a distance. Relying on what it termed the "plain meaning of the statute," it held that the Congress had intentionally denied sixty-mile tracks the right to enjoin the acceptance of wagers at IOTB offices that fail to

obtain their consent. This holding is not compelled by the language of the statute and is implausible in light of the economic realities of the horse racing industry. Congress did not enact the statute from the same distance that the First Circuit construed it. When Congress drafted the IHA, it heard testimony from numerous organizations and experts concerning the horse racing industry. Taken in context, the First Circuit's holding is inconsistent with Congress' detailed understanding of the marketplace. More importantly, it raises the specter that the precise danger Congress sought to prevent will come to pass.

Congress was expressly concerned with the continued health of the horse racing industry in the face of the spread of IOTB. "Off track parimutuel wagering on an interstate basis will result in a severe decrease in the number of racetracks." H.R. Rep. No. 94-1366, 94th Cong., 2d Sess. at 1-2 (1976). *Amici* share this concern, and believe that the First Circuit's decision will have dramatic repercussions throughout the horse industry. Any decrease in the number of racetracks poses a severe threat to the industry and the many layers of workers that it encompasses. In addition to the owners and the breeders, racetracks and farms employ countless persons. The care and feeding of horses employs trainers, grooms, exercise riders, outriders, and veterinarians.

Each racetrack supports two layers of employees. In addition to those at the site, the market created by that racetrack helps to support those on the farm where the horses require the same level of care from grooms, riders and veterinarians. The loss of a racetrack reverberates through the industry costing jobs both at that location and at the others that it helps support.

Congress understood the network of dependence that characterizes the industry, and it crafted the IHA so as to minimize the threat posed by IOTB. "[O]ne evil which enactment of [the IHA] will prevent is the proliferation of interstate wagering and the resultant demise of racing." *Interstate Horseracing Act: Hearings Before the Senate Comm. on Commerce*, 95th Cong., 1st Sess. 17 (1977) (Statement of Senator Huddleston). Viewed through this lens, the central importance of the sixty-mile track approval provision appears. It is the only section of the IHA that protects against the threat posed by IOTB. 15 U.S.C. § 3004(b). Every other party with approval rights has a financial incentive to continue simulcasting that competes with the "currently operating track." The host entities make money through simulcasting and are not threatened by the acceptance of wagers in another state. They are insulated by distance. The racing commission stands to prosper from increased tax revenues generated from the money wagered at the IOTB. Indeed, the demise of a track in a neighboring state could be in the best interests of the other state's racing commission. Although these entities have coercive enforcement authority, not one of them has any reason to act to protect a regional racetrack's live product. Only the sixty-mile track has any economic incentive to protect itself, and to protect racing. As a result, the First Circuit has disempowered the one entity with whose interest the Congress was expressly concerned.

The decisions of this Court demand that in considering whether to infer a cause of action in favor of a party, courts must consider the circumstances of the statute's enactment. *See Transamerica Mortgage Advisors, Inc. v.*

Lewis, 444 U.S. 11, 18 (1979). Here, the circumstances that led to the enactment of the IHA strongly favor the enforceability of the petitioner's right. When first introduced in Congress, the bill that became the IHA banned the acceptance of interstate wagers on horse racing. *See Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 94-1366, 94th Cong., 2d Sess. at 1-2 (1976). In 1978, after much lobbying and negotiation, Congress passed the IHA. As enacted, the IHA prohibited the acceptance of interstate wagers *unless* its conditions were fulfilled. *See* 15 U.S.C. § 3003 ("No person may accept an interstate off-track wager *except* as provided in this chapter."). The statute requires all five enumerated consents. The First Circuit's decision allows the acceptance of an interstate off-track wager that does not comply with the statute. Thus, it permits the unimpeded spread of IOTB.

Amici believe that IOTB outlets will take the First Circuit's decision as a license to evade the IHA's consent requirements. A recent decision in Kentucky, *KHBPA v. Turfway Park Racing Association*, 1993 U.S.Dist.Lexis 13164 (E.D.Ky. Sept. 20, 1993), increases this likelihood. In that case, the district court held the IHA unconstitutional as applied on First Amendment and vagueness grounds. At the moment, courts have told betting interests that the IHA is no barrier to their spread. *Amici* rely on the vitality of the sixty-mile consent provisions to protect their interests. If those provisions are not enforceable, then they provide no protection at all. Because Congress was expressly concerned with the interests that *amici* represent, this Court should grant the requested writ. The current proliferation of gambling in general and IOTB in particular makes this case one that warrants review now,

as opposed to later. The interpretive questions raised by the petition have real consequences, and those real consequences should compel review here.

SUMMARY OF THE ARGUMENT

The continued vitality of small regional racetracks is integral to the continued vitality of the Thoroughbred industry. Congress, in enacting the IHA, recognized the potentially destructive impact IOTB could have on the economic viability of small racetracks. With that in mind, Congress enacted a system whereby certain consents are necessary in order for an entity to conduct IOTB. By effectively eliminating the necessity to obtain the consent of racetracks within sixty miles of the IOTB site, the First Circuit in its decision in *Sterling* upsets the careful balance crafted by Congress in drafting the IHA.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue.

Respectfully submitted,

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